

BEFORE THE  
**Federal Communications Commission**

WASHINGTON, D.C.

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In re Applications of

TRINITY BROADCASTING OF  
FLORIDA, INC.

For Renewal of License of Station WHFT(TV),  
Channel 45, Miami, Florida

GLENDAL E BROADCASTING COMPANY

For Construction Permit for a New Commercial  
TV Station on Channel 45 at Miami, Florida

) MM Docket No. 93-75

) File No. BRCT-911001LY

) File No. BPCT-911227KE

) ORAL ARGUMENT REQUESTED

To: The Review Board

**CONSOLIDATED BRIEF AND EXCEPTIONS  
OF NATIONAL MINORITY T.V., INC.**

**NATIONAL MINORITY T.V., INC.**

Kathryn R. Schmeltzer  
Gregory L. Masters

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Dated: January 23, 1996

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## **SUMMARY**

Judge Chachkin's resolution of the de facto control and abuse of process issues rests on the premise that National Minority T.V., Inc. ("NMTV") was nothing more than the "alter ego" of Trinity Broadcasting Network ("TBN") and its President, Dr. Paul Crouch, and was never a bona fide minority corporation under bona fide minority control. The Judge was able to reach this conclusion, however, only by excluding and/or ignoring a vast array of evidence proving that at all times, a majority of NMTV's governing Board consisted of minority individuals who thought and acted independently, who came to NMTV's Board with extraordinary credentials in the minority community, and who from the very inception of their involvement with NMTV have been committed to serving the needs of minorities through the operation of television stations -- a purpose that has been manifested in the exemplary operation of NMTV's Portland, Oregon station.

Furthermore, NMTV was formed and existed for its first 13 years (including an approximately six-year period during which it was essentially a dormant company) under a concept by which a minority controlled start-up enterprise (NMTV) would receive significant financial, technical and operational assistance from an established non-minority broadcaster (TBN) until the minority enterprise was able to stand on its own. This concept was at the nexus of at least four areas of Commission law and policy -- (i) de facto control; (ii) policies promoting minority ownership; (iii) exemptions from the multiple ownership rules; and (iv) policies regarding operation and control of non-stock licensees -- that were far from readily interpretable at the time and remain unclearly defined today. In implementing this concept, NMTV justifiably and in good faith relied on the guidance of its specialized FCC counsel. The Judge erred by refusing to consider this reliance and, worse, gratuitously second-guessing counsel's interpretation of the law despite the lack of any evidence that that interpretation was made in bad faith.

In addition, the ID is propelled by a number of significant misperceptions which seemed to obsess the Judge, leading him to ignore much more relevant and probative evidence. For instance, the Judge

became absorbed with the fact that NMTV's Articles of Incorporation do not expressly provide for minority control or state a minority purpose -- despite the fact that the charters of numerous preeminent minority broadcast companies also do not contain such provisions. As a result, the Judge turned his back on a host of uncontroverted testimony showing that service to minorities was a primary purpose of NMTV's Directors from the corporation's very inception. Moreover, the facts that the Judge finds to be the "best illustration" of TBN's financial control over NMTV are based on the serious misperception that non-profit religious entities with the common purpose of spreading the faith must be held to the financial decisionmaking standards of Wall Street bankers.

Finally, the ID rests on a number of factual findings and conclusions that are simply wrong. Primary among these are the Judge's conclusion that Jane Duff "aided and abetted" TBN's alleged control over NMTV, which finds no evidentiary support in the record, and his patently incorrect finding that TBN controls NMTV "to this day." For all the reasons set forth herein, the ID should be reversed.

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TV Station on Channel 45 at Miami, Florida	)	ORAL ARGUMENT REQUESTED

To: The Review Board

**CONSOLIDATED BRIEF AND EXCEPTIONS  
OF NATIONAL MINORITY T.V., INC.**

National Minority T.V., Inc. ("NMTV"), by its attorneys, hereby submits its Exceptions to the Initial Decision of Administrative Law Joseph Chachkin, FCC 95D-13 (released November 6, 1995) (the "ID"). As shown below, the ID fails to fully and fairly consider the evidence presented to the Judge, and is driven by numerous flawed assumptions and erroneous findings of fact. Accordingly, the ID should be reversed.<sup>1/</sup>

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<sup>1/</sup> NMTV also supports the Exceptions of Trinity Broadcasting Network ("TBN") and Trinity Broadcasting of Florida, Inc. ("TBF"), to the extent TBN and TBF state other grounds for error not mentioned herein with respect to the Judge's resolution of the de facto control and abuse of process issues. Furthermore, NMTV continues to believe that the Proposed Findings of Fact and Conclusions of Law filed jointly by NMTV, TBN, and TBF on August 15, 1994 (hereinafter "Findings") represent the proper findings of fact and conclusions of law with respect to all issues in this case. As NMTV is not an applicant in this case, however, these Exceptions do not address the standard comparative issue or the basic qualifying issues against Glendale Broadcasting Company ("Glendale").



## **STATEMENT OF THE CASE**

1. The Hearing Designation Order, 8 FCC Rcd 2475 (M.M. Bur. 1993) (“HDO”), designated issues to determine (i) whether Paul F. Crouch, Trinity Christian Center of Santa Ana, Inc. d/b/a Trinity Broadcasting Network (“TBN”) or TBN’s affiliates exercised de facto control over NMTV; and (ii) whether NMTV, Paul F. Crouch, TBN, or TBN’s affiliates abused the Commission’s processes by using NMTV to evade the Commission’s multiple ownership rules and/or to improperly claim minority preferences in LPTV applications. HDO, ¶ 48. In his ID, Judge Chachkin concludes that “it is beyond question that TBN has exercised *de facto* control over TTI and its successor NMTV.”<sup>2/</sup> ID, ¶ 304. He further concludes that “NMTV, Crouch and TBN abused the Commission’s processes by using the applications to garner Crouch and TBN television station interests to which they were not entitled.” ID, ¶ 329.

2. It is unclear from the ID exactly to what extent the Judge affirmatively found NMTV itself, as opposed to Dr. Crouch and TBN, culpable for violations of the Commission’s Rules.<sup>3/</sup> The ID uses the terms “NMTV,” “Crouch,” and “TBN” interchangeably, with little or no apparent consideration of NMTV’s individual conduct.<sup>4/</sup> It is abundantly clear that the Judge failed to consider NMTV’s specific

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<sup>2/</sup> “TTI” refers to Translator T.V., Inc., the original corporate name of the entity that is now NMTV. Indeed, the Judge’s reference to NMTV as a “successor” of TTI is not literally correct. While National Minority T.V., Inc. is the subsequent (and present) name of the same corporate entity (the name change occurred in 1987), there has always been just one entity, and so it is inaccurate to state that NMTV is a “successor.”

<sup>3/</sup> This is an important point, as NMTV is the licensee of one full-power television station -- KNMT(TV), Portland, Oregon -- and numerous television translator stations. NMTV’s application for renewal of its Portland station license has been challenged by Maravillas Broadcasting Company, which has common ownership with Glendale.

<sup>4/</sup> This is best illustrated in ¶¶ 329-330 of the ID. Judge Chachkin concludes ¶ 329 by stating that “it must be concluded that NMTV, Crouch and TBN abused the Commission’s processes by using [NMTV applications for full-power stations] to garner Crouch and TBN television station interests to which they were not entitled.” (Emphasis added). In the very next sentence, however (the first sentence of ¶ 330), the

conduct and culpability because he simply felt that NMTV was “TBN’s alter ego.” ID, ¶ 329. The crux of the Judge’s conclusions is at ¶ 331 of the ID, where the Judge states that “TBN and Crouch created a ‘sham’ corporation [NMTV] to take advantage of the minority preference.” Implicit in this statement is the Judge’s conviction that NMTV was and is nothing more than an extension of TBN and Dr. Crouch, and was never a bona fide minority corporation over which its minority Directors, who at all times comprised a majority of NMTV’s Board, exercised bona fide control.

### **QUESTIONS PRESENTED**

- (1) Whether, in excluding and/or ignoring evidence of NMTV’s bona fide minority purpose and control, as well as testimony by NMTV’s Directors of how the company operated and their lack of intent to violate Commission Rules, the Judge failed to fully and fairly consider the record as a whole.
- (2) Whether the Judge erred by rendering findings and conclusions adverse to NMTV without consideration of NMTV’s justifiable reliance on its counsel’s good faith interpretation of numerous unsettled areas of Commission law and policy.
- (3) Whether the Judge based his ID on numerous flawed assumptions and inaccurate findings of fact.

### **ARGUMENT**

#### **I. The Presiding Judge Failed to Fully and Fairly Consider the Record as a Whole**

3. It is a bedrock principle of administrative law that an agency ALJ’s duty “is to develop the record fully and fairly.” Bishop v. Sullivan, 900 F.2d 1259, 1262 (8th Cir. 1990); see Tidewater Radio Show, Inc., 75 F.C.C.2d 670, 679 (1980); Lamar Life Insurance Co., 5 F.C.C.2d 37, 40 (1966). The Judge failed to do this. There is much more to this case than the facts regarding TBN’s assistance to

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<sup>4/</sup> (...continued)  
Judge “further conclude[s] that TBN’s and Crouch’s misconduct was intentional.”  
(Emphasis added).

NMTV. Any full and fair treatment of the hearing record would necessarily also involve consideration of the reasons why such assistance was undertaken, the legal and factual context in which NMTV was formed and operated, and the mindsets and visions of the principals involved throughout the pertinent time period.

4. Unfortunately, these other aspects of the case are not apparent from a reading of the ID. They are not apparent because the Judge failed to consider an abundance of evidence proving NMTV's bona fide minority purpose, its bona fide fulfillment of that purpose, its bona fide minority control, and the absolute lack of any intent on the part of its Directors to violate any Commission rule or policy. The result is an ID which grossly distorts reality, and which must be reversed.

5. Central to the Judge's adverse resolution of the de facto control and abuse of process issues was his conclusion that, although a majority of its Board of Directors at all times was comprised of minorities, NMTV was not in reality a corporation with a minority purpose or under minority control. The Judge was able to arrive at this conclusion only by failing to consider a wealth of evidence showing: (i) that NMTV was envisioned by each of its minority Directors, from the outset of their involvement, as a corporation designed to involve minorities in the broadcast industry and to serve the needs of minorities through operation of its television stations; (ii) that NMTV's minority Directors thought independently, voiced opinions independently, outvoted NMTV's non-minority Director on critical issues, and at all times had the power to remove the non-minority Director without cause; and (iii) that NMTV in fact carried out the minority purpose for which it was formed.

6. Much of this evidence is not even in the record because the Judge excluded it altogether. For instance, the Judge excluded pages and pages of direct case testimony by NMTV's minority Directors that set forth the life experiences and deep commitment to minority service that underlay their visions of NMTV, as well as the extraordinary background and credentials of those Directors in the minority community. (See Tr. 550-560, 691-699, 742). As a result of these exclusions, the record in this case does

not reflect, for example, the experiences of Jane Duff that led to her sincere personal convictions regarding the critical role the Church must play in the minority community. See TBF Ex. 101, ¶¶ 20-28. Nor does it reflect the numerous and prominent leadership positions that NMTV Director E.V. Hill has occupied in the minority community (including membership on President Reagan's Private Sector Initiative and the Board of Directors of the Los Angeles NAACP), or the fact that Rev. Hill was nominated to serve as Chairman of the United States Civil Rights Commission. See TBF Ex. 102, ¶¶ 3-10. Similarly, the record does not reflect NMTV Director Armando Ramirez's years of experience with the public radio system in Mexico or his many leadership positions in minority and religious organizations. See TBF Ex. 103, ¶ 3.

7. The Judge excluded this evidence on the ground that "[t]his is a control issue and . . . we don't need background in here." (Tr. 554). In so doing, the Judge erred, as the excluded evidence is highly relevant to the "control issue."<sup>5/</sup> In numerous prior cases, the Commission has discredited broadcast ventures in which non-minority investors have committed substantial funds to minority "fronts"

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<sup>5/</sup> From the earliest stages of the hearing, the Judge made clear he was uninterested in considering anything more than what he viewed as the basic "control" facts. Early in the admissions session, in excluding evidence of minority employment and programming at NMTV's Portland, Oregon, station (discussed infra), the Judge stated that he was "only interested in who made the decisions [at NMTV], not what the decisions were," and that "the programming which was produced [that] was beneficial for minorities or practices [that] are beneficial to minorities has no bearing on who made these decisions." (Tr. 479, 482). The Judge's narrow view of the case not only permeated the admissions session, but also pervades the ID, which focuses almost exclusively on the ways in which TBN was involved in NMTV's affairs while all but ignoring the evidence (to the extent the Judge even allowed such evidence into the record) of NMTV's bona fides as a minority-controlled company and the good faith of its Directors.

Indeed, with all due respect to the Presiding Judge, it would not be an exaggeration to suggest that the Judge may have resolved the de facto control and abuse of process issues in his own mind long before the hearing ended. This seems apparent, for example, from the Judge's scathing cross-examination of Jane Duff on the matter of the absence of a minority purpose in NMTV's Articles of Incorporation, excerpted infra. Further examples occur as early as the admissions session. For instance, at Tr. 483-484, the Judge "assume[s]" that NMTV "is a white-controlled organization." Moreover, at Tr. 727, the Judge, in discussing the admissibility of certain testimony by Rev. Hill, comments that "I don't think this [testimony] will help [Hill]."

with no credentials who, while claiming to have total control of the venture, were in fact totally passive vis-a-vis their non-minority financiers. See, e.g., Imagists, 6 FCC Rcd 7440, 7449 (Rev. Bd. 1991), modified, 8 FCC Rcd 2763 (1993); Poughkeepsie Broadcast Limited, 6 FCC Rcd 2497, 2498 (1991); Metroplex Communications, Inc., 4 FCC Rcd 8149, 8159 (Rev. Bd. 1989), modified, 5 FCC Rcd 5610 (1990). The background information excluded by the Judge here would have established exactly the opposite principle -- that NMTV's minority Directors, far from being hand-picked "fronts" with no qualifications, are leaders in the minority community, several of whom have substantial prior broadcast experience, and are not the type of persons who would be subjected to dominion or control by TBN, Crouch, or anyone else. Moreover, the extensive background of NMTV's Directors in service to the minority community is directly relevant to proving that NMTV was in fact a corporation formed with the bona fide purpose of serving the needs of minorities. The Judge's exclusion of this evidence was patently erroneous.

8. The Judge also erroneously excluded other testimony of NMTV's minority Directors which made clear that service to minorities was and is a central purpose of NMTV. See, e.g., Tr. 612 (striking Jane Duff testimony that "NMTV seeks to provide opportunities and service to the minority community"); Tr. 630-31 (striking Duff testimony as to what she believed was required for NMTV "to be a successful minority company"); Tr. 738 (striking Hill testimony that he is "deeply interested in minority-owned television stations" and that NMTV "gives us the vehicle to accomplish that goal"); Tr. 749-50 (striking Ramirez testimony that "I believe deeply in NMTV's purposes to further the cause of minority involvement in the world of television and to provide programming to benefit minorities," and his commitment to realizing that objective from the time NMTV was first described to him).<sup>6/</sup>

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<sup>6/</sup> Notably, even counsel for the Mass Media Bureau took the position that "NMTV [] had certain goals and intentions and what they did with those intentions I think are relevant to . . . the control issue." (Tr. 630).

9. To the extent the Judge admitted evidence of NMTV's minority purpose as envisioned by its Directors, the ID simply ignores it. Apparently preoccupied with the lack of a stated minority purpose in NMTV's Articles of Incorporation (as discussed in more detail infra), the Judge fails in his ID to even acknowledge uncontroverted evidence of the commitment of NMTV and its Directors to serving the needs of minorities. Among other things, the ID ignores the following facts:

- \* When NMTV was created in 1980, Dr. Crouch told Ms. Duff of the Commission's proposal to assist minorities in becoming involved in low power television, and of his idea to create a new company controlled by minorities. (Findings, ¶ 15).
- \* Thereafter, Ms. Duff approached Dr. Ramirez to serve as a Director and explained to him that NMTV's purpose was to help minorities get involved in communications. (Findings, ¶ 170).
- \* In 1987, Ms. Duff (joined by then-NMTV director David Espinoza) overruled Dr. Crouch's proposal to sell the construction permit for a station in Odessa, Texas, that NMTV had just acquired, and instead voted to build the station. Contemporaneous minutes of that Board meeting reflect Ms. Duff's opinion that "the Midland-Odessa permit provided [NMTV] with a valuable opportunity to establish minority-controlled television as a success." Ms. Duff herself testified that "I felt that NMTV's sale of the permit would symbolize and be perceived as another failure by a minority company, and I was strenuously opposed to that happening." (Findings, ¶ 41). Ms. Duff also testified that this was the reason that she voted to forgive the debt owed to NMTV by the eventual buyer of the Odessa station. (Findings at p. 119 n.33). The ID's version of these facts (¶¶ 71, 80) makes absolutely no mention of this testimony.
- \* Following NMTV's acquisition of the permit for its Portland station, Ms. Duff hired a Station Manager for the facility, Mr. James McClellan. Ms. Duff knew Mr. McClellan had a rapport with the minority community and substantial experience in producing minority-oriented programs. Ms. Duff shortly thereafter trained Mr. McClellan regarding his responsibilities as Station Manager, including NMTV's plans to employ minorities and to produce and broadcast local programs that address the needs of the minority community. (Findings, ¶ 80).
- \* Ms. Duff's instructions regarding the production of local programming were implemented at an early stage. Contemporaneous minutes of Board meetings from as early as 1991 reflect discussion among the Directors regarding the production of local programming. Despite substantial obstacles, a local production studio was built at a cost of over \$1 million, and production of local programs to address the needs of the minority

community commenced in 1992. (Findings, ¶¶ 182-185). The Judge, however, chose to state only that “[w]ith the exception of three local programs, . . . NMTV’s Portland station has aired only TBN programming.” ID, ¶ 90.

Again, the Judge’s refusal even to acknowledge this evidence resulted in a skewed ID that unfairly paints NMTV as having no purpose other than to carry out the wishes of TBN and Dr. Crouch.

10. Just as the Judge failed to consider highly probative evidence as to NMTV’s bona fide minority purpose, he also turned his back on extensive evidence that undercut his conclusion that NMTV was not legitimately controlled by minorities. Initially, the ID all but ignores the fact that NMTV’s By-Laws, from the day they were adopted in 1980, have always subjected Dr. Crouch to removal without cause by vote of a majority of NMTV’s Directors, which has always consisted of minority individuals -- despite the fact that NMTV was formed at a time during which the by-laws of TBN and its subsidiaries were being amended to prevent the other directors of those corporations from removing Dr. Crouch without cause. (Findings, ¶¶ 34-39). The Judge simply closes his eyes to this fact, apparently believing that neither Ms. Duff nor any other minority Director on NMTV’s Board would have acted against TBN/Crouch’s interests. Properly considered, however, the evidence proves otherwise.

11. The joint Findings of NMTV, TBN and TBF set forth in detail the pervasive involvement of Jane Duff in NMTV’s day-to-day operations, and described how Ms. Duff’s activities for NMTV differed materially from her responsibilities at TBN. See Findings, ¶¶ 61-64, 67-82, and p. 444. Indeed, even the ID acknowledges many of the activities that Ms. Duff undertook on NMTV’s behalf. See, e.g., ID, ¶¶ 58-59 (Duff negotiated and executed the agreement for NMTV’s purchase of the Odessa station); ¶ 76 (Duff negotiated price for NMTV’s sale of the Odessa station); ¶ 77 (Duff directed personnel, EEO, and rule compliance for Odessa station); ¶ 87 (Duff assisted in negotiating lease for Portland tower site); ¶ 91 (Duff supervised management of Portland station); ¶ 128 (“Duff functions as executive officer of NMTV”).

12. Given that Ms. Duff has been an NMTV Director throughout the corporation's existence, and has been the individual most responsible for supervising NMTV's activities, the conclusion that NMTV was under TBN/Crouch's control can only be reached if it is determined that Ms. Duff's involvement in NMTV was solely as an agent of Dr. Crouch or TBN. Thus, in their Findings, NMTV, TBN and TBF pointed out that the control issue "boils down to the single question of whether Mrs. Duff serves on the NMTV Board individually or as an agent of Dr. Crouch or TBN." Findings, ¶ 646. The Findings cited an array of facts affirmatively disproving any notion that Ms. Duff was an agent of TBN or Crouch on NMTV's Board, among them (i) Ms. Duff's (prevailing) opposition to Dr. Crouch's desire to build an NMTV LPTV station in the Houston, Texas, area; (ii) Ms. Duff's (prevailing) opposition to Dr. Crouch's desire to sell the Odessa construction permit; (iii) Ms. Duff's negotiation of affiliate termination rights in NMTV's affiliation agreements with TBN that are not customary in such agreements; and (iv) Ms. Duff's negotiation of the price for TBN's business services to NMTV down to a level half of what TBN wished to charge. Findings, ¶ 647.

13. The ID, however, makes only a token attempt to grapple with this critical issue. The Judge's full analysis on this point is contained in a footnote (n.41) on page 39 of the ID:

According to Trinity, the ultimate question in resolving whether Crouch and/or TBN exercised *de facto* control over NMTV is whether Duff acted independently of Crouch or as his agent when she performed her role as a director of NMTV. Trinity PFCs at p. 440. The Presiding Judge does not agree with Trinity's proposition. Further, Trinity has failed to show Duff was independent. To support the conclusion that Duff was independent, Trinity cites those rare instances where Duff did not agree with Crouch with respect to a matter concerning NMTV's affairs. Trinity PFCs at pp. 440-444. However, given Duff's continued roles at TBN, it is virtually impossible to conclude that Duff's activities on behalf of NMTV, including the few times Duff opposed Crouch's desires, were not the result of her assessment of what would be in the best interests of TBN. Thus, Duff's purported independence as an NMTV board member does little to support a conclusion that Crouch and/or TBN did not exercise *de facto* control over NMTV since Duff, during the entirety of her tenure as [an] NMTV board member, also had a fiduciary responsibility to TBN.

14. Thus, the Judge begins his consideration of the most critical question regarding the de



facto control issue -- i.e., whether Ms. Duff served as an NMTV Board member independently or as an agent of TBN -- by brushing off the suggestion that such consideration is necessary at all. He then backtracks slightly to summarily conclude that the "rare instances" in which Ms. Duff disagreed with Dr. Crouch are not enough. The only reason given for this conclusion is that Ms. Duff was also an employee at TBN. Yet the detailed Findings of NMTV, TBN and TBF as to Ms. Duff's much more substantive involvement with NMTV vis-a-vis TBN are not even acknowledged in the ID. Moreover, none of the significant facts that the Judge dismisses as "rare instances" are ever addressed individually, nor are any reasons given why those facts are somehow insignificant.<sup>7/</sup> Such an unreasoned analysis of a pivotal issue, standing alone, requires reversal of the ID. See Washington's Christian Television Outreach, Inc., 94 F.C.C.2d 1360 (1983).<sup>8/</sup>

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<sup>7/</sup> Moreover, the Judge's statement in n.41 that "Duff, during the entirety of her tenure as [an] NMTV board member, also had a fiduciary responsibility to TBN" is flatly wrong. Ms. Duff resigned as a TBN director in 1984, at a time when the processing of NMTV's first LPTV filings was frozen and NMTV was basically an inactive company. (Findings, ¶ 61; TBF Ex. 101, ¶ 79). She was never a TBN officer or director thereafter, save for an approximately one-year stint as an Assistant Secretary of TBN in the 1990s. Thus, for a substantial part of the time period pertinent to the hearing, Ms. Duff was neither an officer nor a director of TBN and therefore owed no fiduciary duty to TBN. In any case, the Commission has only recently ruled that "[f]iduciary duties do not make the fiduciary an all-purpose agent of the person or company to which the duty is owed." Fox Television Stations, Inc., 10 FCC Rcd 8452, 8522 (1995). Thus, the Judge's assertion that Ms. Duff owed a fiduciary duty to TBN throughout her tenure at NMTV is not only factually wrong, but in any event provides no legal basis for a conclusion that Ms. Duff was controlled by TBN or Dr. Crouch.

<sup>8/</sup> The Judge's failure to acknowledge, if not outright exclusion, of the facts demonstrating bona fide control by NMTV's minority Directors stands in stark contrast to the Judge's treatment of remarkably similar facts in Ellis Thompson Corp., FCC 95D-14 (released November 14, 1995) -- a summary decision by Judge Chachkin released a mere eight days after the ID in this case. Though Ellis Thompson involved the issue of de facto control of a cellular licensee, the factors guiding a de facto control analysis in common carrier cases significantly overlap the considerations in broadcast cases. See Intermountain Microwave, 24 R.R. 983, 984 (1963) (de facto control factors in common carrier cases include: who controls daily operations; who determines and carries out the licensee's policy decisions; and who is in charge of employment, supervision, and dismissal of personnel).

(continued...)

15. The Judge's treatment of the participation of NMTV's other minority Directors is similarly unreasoned. In typically one-sided fashion, the ID recites a litany of mainly operational details about which NMTV's other minority Directors (Espinoza, Aguilar, Hill and Ramirez) were not familiar. ID, ¶¶ 111, 118, 123, 128-130. At the same time, it ignores a host of facts reflecting what these Directors did know, and the substantial contributions and ideas that they provided. See Findings, ¶¶ 87-116, 125-146, 152-166, 173-174.<sup>8/</sup> Moreover, the Judge's findings and conclusions on the participation of NMTV's other minority Directors fail to recognize the fact that on non-profit boards, one person (here, Ms. Duff) is typically responsible for the entity's day-to-day operational details, while the other directors serve in more

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<sup>8/</sup> (...continued)

In finding that the cellular licensee in Ellis Thompson had not abrogated de facto control of its system to the management company with which it had contracted, Judge Chachkin found it "noteworthy that over the years Thompson has successfully negotiated significant reductions in the agreement[']s management fee from 15% to 7.5%." FCC 95D-14, ¶ 20. Yet Judge Chachkin's instant ID ignores the virtually identical fact that Ms. Duff negotiated TBN's fee for services to NMTV under the business services agreement between the entities in half. Likewise, the Judge's decision in Ellis Thompson states that the licensee "always rejected [the management company's] recommendations when he believes that they are not in the system's best interest," and proceeds to cite four examples of decisions the licensee made independently of the management company. Id., ¶ 34. Here, however, the ID dismisses without discussion the numerous instances in which NMTV's minority Directors acted against the wishes of Dr. Crouch and TBN. Moreover, the Judge's Ellis Thompson decision finds that the licensee had "actual control" over its system's personnel management because, although the management company hired, fired, and supervised personnel, the management company "itself is subject to dismissal for cause by [the licensee]." Id., ¶ 44. Yet here, the Judge finds insignificant the fact that Dr. Crouch has always been subject to dismissal as an NMTV Director by vote of the corporation's minority Directors, with or without cause. Indeed, in Ellis Thompson the Judge plainly found the licensee's right to terminate the management contract to be decisionally significant to his finding that the licensee had not abrogated de facto control. Here, however, the Judge ignores the fact that NMTV similarly had the right to terminate TBN's business services.

<sup>9/</sup> At various points where the Judge cites actions by one of NMTV's other minority Directors, he downgrades those actions in direct contravention of the record. For instance, documentary evidence was presented at the hearing that former NMTV Director David Espinoza consented to the actions taken at NMTV's first Board meeting. (MMB Ex. 12). The ID states, however, that Espinoza "asserts that he consented" to those actions. ID, ¶ 22 (emphasis added). See also ¶ 109 (Espinoza "claimed" he voiced his opinion even if it was contrary to Crouch's express views, despite contemporaneous Board minutes reflecting his expression of those opinions).

advisory, “big picture” capacities. NMTV proffered testimony of its Directors establishing this fact, based on their experience on the boards of directors of other non-profit entities. The Judge, however, ruled such evidence to be irrelevant to the designated de facto control issue, and rejected it. (See Tr. 652-657, 686-689, 700, 746-747, 793).<sup>10/</sup>

16. Finally, the Judge erred by excluding evidence that NMTV has in fact carried out the minority purpose for which it was formed. NMTV proffered detailed information as to the recruitment, hiring, training and promotion of minority employees at its Portland television station, the locally produced programming at the station that is responsive to the needs of minorities, the minority individuals and entities that have appeared on those programs, and the efforts of the station to reach out to minorities in the station’s service area. See TBF Ex. 109. The Judge excluded virtually all of this evidence. Tr. 832-861 (particularly Tr. 840, where the Judge states that the extent to which NMTV has satisfied the Commission’s minority policies is “not the purpose of this hearing”); Tr. 478-494 (Judge rules that minority employment and minority programming is irrelevant to control issue); Tr. 620, 622; Tr. 734-735.

17. The Judge’s exclusion of this evidence was improper. Surely, had NMTV’s Portland station carried no minority programming and hired no minority employees, NMTV’s opponents would not have hesitated to cite such facts in support of their arguments that NMTV was nothing more than an alter ego of TBN.<sup>11/</sup> Indeed, given his attack on NMTV’s minority bona fides based on the lack of a stated minority purpose in its Articles, the Judge himself plainly thought evidence of NMTV’s minority purpose relevant to the control issue. The Judge’s simultaneous exclusion of evidence proving that such a purpose was in fact being carried out was grossly unfair, and constitutes reversible error.

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<sup>10/</sup> Ironically, however, the Judge proceeded at hearing to cross-examine Rev. Espinoza about his experience on another non-profit board. (Tr. 4192-93).

<sup>11/</sup> Amazingly, that is precisely what SALAD did in this case. After siding with Glendale on the exclusion of evidence relating to minority recruitment, hiring, programming and outreach at the Portland station, SALAD turned around and asserted in its proposed findings that NMTV had done nothing for minorities. SALAD Findings, ¶¶ 86, 119.

18. Equally unfairly and erroneously, the Judge also arbitrarily excluded first-hand testimony by NMTV's own Directors that, from their perspective, NMTV functioned as a minority-controlled company. For instance, the Judge struck the testimony of Ms. Duff, the Director most active in the corporation's day-to-day affairs, that "NMTV has a functioning minority-controlled Board of Directors," on the ground that "I don't see how the witness' belief is . . . relevant." Tr. 468-469; see also Tr. 622-623. One would think that there hardly could be more probative evidence of where control of a corporation resides than the perceptions of the individuals who witnessed the company's operation first-hand. The Judge was free to permit cross-examination of such testimony and assign that testimony whatever weight he deemed appropriate, but to exclude it was gross error. Even Bureau counsel recognized this. See Tr. 468 (Bureau counsel states that "[t]he concept of whether the board functions and is a functioning board is a matter [about which] the witness is entitled to testify").

19. Moreover, the Judge suggested that good faith does not enter into the issue of compliance with Commission rules and requirements (Tr. 691), and, consistent with that mindset, excluded numerous portions of testimony by NMTV's Directors stating their seriousness toward complying with Commission rules and policies and their lack of any intent to violate such rules and policies. (See, e.g., Tr. 565, 759, 766). The Judge's position, however, is contrary to established precedent.<sup>12/</sup> Such evidence at a minimum was relevant to the abuse of process issue, for it is well-established that a specific showing of abusive intent is required for an abuse of process finding. See Evansville Skywave, Inc., 7 FCC Rcd 1699, 1702 n.10 (1992); WWOR-TV, Inc., 7 FCC Rcd 636, 638 (1992), aff'd, 996 F.2d 386 (D.C. Cir. 1993). Moreover, it is settled Commission law that absence of intent to engage in wrongdoing is a factor that mitigates violations of Commission rules. See The Thoms Broadcasting Cos., Inc., 62 F.C.C.2d 496, 508

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<sup>12/</sup> Bureau counsel recognized the admissibility of evidence of intent as well. See Tr. 470 (Bureau counsel states that "in all fairness I think that intent is a critical element of . . . the issues in this case in that Ms. Duff's state of mind is of some import as to disposition of those issues").

(Rev. Bd. 1976) (“A principal’s lack of knowledge of wrongdoing mitigates the consequences of that behavior.”) (citing Sumiton Broadcasting Co., Inc., 20 F.C.C.2d 669 (Rev. Bd. 1969)).

20. In short, the Judge was presented with a wide array of evidence establishing NMTV’s bona fide minority purpose, bona fide control by its minority Directors representing a bona fide majority of the Board (including the testimony of NMTV’s own Directors attesting to such control), bona fide service to the minority community, and the lack of any intent on the part of NMTV’s Directors to violate Commission rules or policies. The Judge instead chose to exclude much of this evidence, and to the extent he did not exclude such evidence, he simply ignored it.<sup>13/</sup> The picture the ID paints of NMTV as a result of the Judge’s uneven treatment of the record reflects nothing close to reality, and for that reason alone, the ID should be reversed.

**II. The Presiding Judge Erred by Failing to Consider NMTV’s Justifiable Reliance on Its Counsel’s Good Faith Interpretation of Numerous Unsettled Areas of Commission Law and Policy**

21. Consistent with his seeming indifference to evidence of NMTV’s true nature as a bona fide minority-controlled entity and the lack of any intent on the part of NMTV’s Directors to violate

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<sup>13/</sup> Indeed, throughout the hearing the Judge displayed a disturbing insensitivity to NMTV’s efforts to show its bona fides as a minority-controlled entity. For instance, at Tr. 685, the Judge gratuitously degraded Rev. Hill’s testimony concerning his involvement in restoring racial peace in Los Angeles in the wake of the Rodney King verdict with the comment: “I see we even brought Rodney King into this.” During Rev. Hill’s testimony, the Judge repeatedly questioned Rev. Hill about why he believed a commercial religious television station would benefit minority communities, until Rev. Hill was finally constrained to point out: “Sir, at that point I’d like to suggest that I might have a little bit more experience in my community as to what would be helpful. . . .” (Tr. 2007-2012). Indeed, throughout the hearing, the Judge for some reason simply refused to accept the opinions of NMTV’s minority Directors that religious/gospel programming is of vital assistance to minorities. Even after excluding NMTV’s Directors’ testimony on this point (see Tr. 563-564, 697, 710), the Judge’s ID makes clear his belief that religious purposes and minority purposes are mutually exclusive by containing statements such as the indictment of NMTV as “be[ing] nothing more than another vehicle to carry out TBN’s mission of spreading the gospel over the airways.” ID, ¶ 306; see also ¶¶ 21, 48, 305.

Commission rules, the Judge proceeds to render findings and conclusions that are profoundly adverse to NMTV while failing to recognize that the Commission rules and policies here at issue are hardly well-defined. To read the ID, one would think that this was nothing more than a clear-cut case of an impermissible transfer of de facto control. Nothing can be further from the truth. To the contrary, the conduct that the Judge so confidently condemned occurred at the nexus of at least four areas of Commission law and policy that were far from readily interpretable -- particularly at the time the conduct occurred. It is far from clear that NMTV's operations ever crossed over the poorly-lit boundaries of those rules and policies, much less that such boundaries were intentionally crossed. Yet the Judge not only discounts NMTV's reliance on its specialized counsel for guidance within the complex nexus of these numerous rules and policies, but scoffs at the advice that was given.

22. To begin with, the Commission has observed that the concept of de facto control itself is particularly "suffused with illusiveness and subjectivity." Spanish International Communications Corp., 1 FCC Rcd 92, 93 (Rev. Bd. 1986), modified, 2 FCC Rcd 3336 (1987). The Communications Act contains no definition of "control" for the purposes of Section 310(d), and the Commission has recognized that "there is no precise formula by which control may be ascertained." William S. Paley, 1 FCC Rcd 1025 (1986), recon. denied, 2 FCC Rcd 2274 (1987), aff'd sub nom. Fairness in Media v. FCC, 851 F.2d 1500 (D.C. Cir. 1988). Accordingly, questions as to de facto control must of necessity be decided on a case-by-case basis. See The Seven Hills Television Co., 2 FCC Rcd 6867, 6884 (Rev. Bd. 1987), modified, FCC 88R-10 (released February 25, 1988); Arnold L. Chase, 5 FCC Rcd 1642, 1644 (1990).

23. In NMTV's case, however, the guiding law was complicated even further by the convergence of several other areas of theretofore largely uninterpreted Commission law and policy. As is fully discussed in the NMTV/TBN/TBF Findings, NMTV was formed in the good faith belief, backed by advice of FCC counsel, that the creation of a broadcast corporation controlled by minorities while receiving substantial administrative, technical and financial assistance from a non-minority entity would

advance Commission policies promoting minority ownership. Given his reading of the Commission's 1982 Statement of Policy on Minority Ownership of Broadcast Facilities, 92 F.C.C.2d 849 (1982) -- which cited a 1982 report by a Commission Advisory Committee recommending joint ventures between startup minority broadcasters and established non-minority operators -- as well as the Commission's revision of its multiple ownership rules three years later allowing parties to hold attributable interests in two additional "minority-controlled" stations,<sup>14/</sup> it was certainly reasonable for NMTV's counsel to interpret these decisions as constituting Commission policy favoring joint ventures between newly-formed minority companies and established non-minority operators, and he so advised his clients. (Findings, ¶¶ 228, 234-235, 254, 657).

24. Additionally, it was necessary to interpret exactly the manner in which this multiple ownership exemption operated -- specifically, what was required to qualify an entity as "minority-controlled." Evidence in the record establishes that NMTV's counsel interpreted the term on the basis of the language of the relevant rule provision itself as well as the Memorandum Opinion and Order adopting the provision<sup>15/</sup> -- both of which defined the term "minority-controlled" in terms of more than 50% ownership by minorities. This was entirely consistent with Commission pronouncements on the operation of the minority preference earlier established in LPTV lotteries (with which NMTV's counsel was familiar), which expressly stated that, in the case of non-stock corporations, entitlement to an LPTV minority preference was based on the composition of the governing board. (Findings, ¶¶ 238-242). Accordingly, counsel for NMTV advised his clients that, since a majority of NMTV's Directors were minorities, Dr. Crouch could hold attributable interests in NMTV full-power stations under the "minority-controlled" exemption. (See Findings, ¶¶ 229-232, 658).

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<sup>14/</sup> For a complete discussion of these guiding statements of Commission policy to promote minority ownership, see Findings, ¶¶ 590-600.

<sup>15/</sup> See Reconsideration of Multiple Ownership Rules, 100 F.C.C.2d 74, 95 (1985).

25. On top of the inherently subjective standard of de facto control, combined with the lack of clarity of the minority ownership policies and multiple ownership exemptions on which the NMTV/TBN venture was premised, there is the fact that NMTV and TBN are both non-stock, non-profit entities. The Commission has acknowledged that non-stock entities with self-perpetuating boards of directors (such as NMTV) do not fall within the framework of its traditional de facto control policies. See Seven Locks Broadcasting Co., 94 F.C.C.2d 899, 901-02 (1983) ("The Commission has never set forth the circumstances which would constitute a transfer of control . . . with regard to non-stock corporate licensees or other licensee entities comprised of a membership body which elects a governing board."); see also Pacifica Foundation, 41 F.C.C.2d 71 (Rev. Bd. 1973). In a Notice of Inquiry, Transfers of Control of Certain Licensed Non-Stock Entities, 4 FCC Rcd 3403 (1989), the Commission solicited public comment on an analytical framework for handling transfer of control issues involving such non-stock entities. To this day, that proceeding has not been resolved.

26. In short, the concept under which NMTV was formed and operated necessitated interpretation not merely of the inherently subjective area of de facto control, but also Commission rules and policies on minority ownership, multiple ownership, and control of non-stock entities that were largely undefined at the time the conduct was undertaken, and which remain far from clear even today. This is compellingly illustrated by the fact that the Commission's own Mass Media Bureau, which is charged with the responsibility of interpreting the agency's broadcast rules, disagreed with the Judge on the question of whether NMTV was entitled to a minority preference in LPTV lotteries. See ID, ¶ 326.

27. There is no evidence in the record that the advice given to NMTV by its counsel in this complex legal area was rendered in bad faith. Similarly, there is no evidence that NMTV's Directors did not rely on that advice in good faith. Yet the Judge entirely discounted NMTV's good-faith reliance on counsel's advice. Worse, he gratuitously second-guessed the advice that counsel gave and rejected the Bureau's own interpretation of the rules it is charged with enforcing. See ID, ¶ 328 & nn. 43, 46. This



latter fact is all the more appalling in light of the Judge's far more generous treatment of Glendale counsel's unilateral "interpretation" of the rules governing the sale of unbuilt construction permits.

Compare ID, ¶ 328 with ¶ 352.

28. The Judge's refusal to consider (indeed, his attack on) NMTV's good-faith reliance on the good-faith advice of its counsel, under the circumstances involved here, was prejudicially erroneous. See Fox Television Stations, Inc., 10 FCC Rcd 8452, 8500 (1995) (reliance on counsel is particularly appropriate in matters involving a "technical issue in a complex area of the law"); see also WEBR, Inc. v. FCC, 420 F.2d 158, 167-68 (D.C. Cir. 1969) (good faith reliance on counsel is relevant to whether applicant proceeded with candor). Standing alone, it is a ground for reversal of the ID.

### **III. The Presiding Judge Relied on Numerous Faulty Assumptions and Inaccurate Findings**

29. The Presiding Judge's reliance on numerous flawed assumptions and inaccurate and/or incomplete findings is a flaw that permeates the ID. The most egregious examples are set forth below.

#### **A. The Judge Erroneously Assumed That NMTV's Governing Documents Must Specify Minority Ownership and/or a Minority Purpose**

30. Possibly the most pernicious assumption in the ID is the Judge's unfounded belief that the governing documents of a minority-owned company must specify that the company is to be owned, controlled, and operated by and dedicated to serving minorities. As noted above, the Judge's preoccupation with the lack of a minority purpose in NMTV's Articles led him to ignore uncontroverted testimonial evidence of precisely such a purpose, and is a driving force behind the Judge's conclusion that TBN controlled NMTV. See ID, ¶ 306 ("Crouch's claim that he intended to create a company which would be owned and controlled by minorities is belied by the fact that the company's governing documents make absolutely no reference to forming a company that would be owned, controlled or